

CALIFORNIA COASTAL COMMISSION

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Item F 5.5

Staff: ANM-SF
Staff Report: 7/27/05
Hearing Date: 8/12/05

STAFF RECOMMENDATIONS AND FINDINGS FOR CEASE AND DESIST ORDER

CEASE AND DESIST ORDER:	CCC-05-CD-09
RELATED VIOLATION FILE:	V-4-02-097
PROPERTY LOCATION:	Broad Beach, Malibu, Los Angeles County
DESCRIPTION OF PROPERTY	An approximately 5800 foot (1.1 miles) stretch of beach both above and below the Mean High Tide Line, including both public and private property, and on private property subject to lateral public access easements and deed restrictions.
SUBJECT PROPERTY:	Assessor's Parcel Numbers: 4470-017-061 through 4469-026-009 (parcel numbers and addresses are listed in Appendix A)
VIOLATION DESCRIPTION:	Unpermitted placement of "private property" signs, metal and wood fencing on the sandy beach seaward of and/or adjacent to two County-owned, operated, and maintained vertical access ways, and use of private security guards on All-Terrain-Vehicles or other mechanized vehicles, all of which discourages or prevents public access along Broad Beach.
PERSONS SUBJECT TO THIS ORDER:	Trancas Property Owners Association
SUBSTANTIVE FILE DOCUMENTS:	<ol style="list-style-type: none">1. Notice of Violation letter, June 23, 20042. Notice of Intent to Commence Cease and Desist Order Proceedings, August 18, 2004 (as re-sent on March 10, 2004).3. Coastal Development Permits as listed in

Exhibit #6 of this staff report.

4. Public records contained in Violation File
No. V-4-02-097

5. Exhibits to this Staff Report #1 - #18

CEQA STATUS:

Exempt (CEQA Guidelines (CG) §§
15060(c)(2) and (3)) and Categorically
Exempt (CG §§ 15061(b)(2), 15307, 15308
and 15321).

I. SUMMARY OF STAFF RECOMMENDATION

Staff recommends that the Commission approve a Cease and Desist Order (as described below) which would require the Trancas Property Owners Association (hereinafter "TPOA") to 1) cease and desist from performing or maintaining unpermitted development including private property signs located along an approximately 5800-foot long stretch of Broad Beach and fencing on the sandy beach located seaward of and/or adjacent to the two County owned and operated vertical public access ways; 2) to cease and desist from operating private security guards patrols; and 3) and to cease and desist from conducting further unpermitted development along Broad Beach. This unpermitted development discourages or prevents public access to and along Broad Beach.

Trancas Property Owners Association

The TPOA is an unincorporated association whose members own property along Broad Beach. The TPOA are represented by a Board of Directors including their president, Arnold Palmer, Secretary and Director, Winefred Lumsden, and agent, Helmut Martinek. The TPOA has confirmed, through numerous correspondence and their Statement of Defense form (Exhibit #4) that they have placed "private property" signs and have hired private security guards either on foot or on all-terrain vehicles or other motorized equipment (hereinafter "ATVs") to patrol the sandy beach area of Broad Beach (see Exhibit #7 for an example of the private security guard patrols).

Public Tidelands

Broad Beach, located in the City of Malibu, is an approximately 1.1 mile stretch of beach located immediately west (upcoast) of Zuma County Beach Park, which is one of the most popular and heavily used beaches in Los Angeles County. There are approximately 108 residences located along Broad Beach (Exhibit #5).¹ At Broad

¹ The TPOA includes properties between APN 4470-017-061 through APN 4469-026-002. There are approximately 7 properties downcoast of APN 4469-026-002 that are apparently not included in the

Beach, as with the rest of the coast of California, the seaward property line (the general line between private and public property) is the Mean High Tide Line (hereinafter “MHTL”). All lands seaward of the MHTL are State tidelands, held in trust for the public. Tidelands include, “those lands lying between the lines of mean high tide and mean low tide which are covered and uncovered successively by the ebb and flow thereof.”² The State owns all tidelands and holds such lands in trust for the public. “The owners of land bordering on tidelands take to the ordinary high watermark. The high water mark is the mark made by the fixed plane of high tide where it touches the land; as the land along a body of water builds up or erodes, the ordinary high water mark necessarily moves, and thus the mark or line of mean high tide, i.e., the legal boundary, also moves.”³ Therefore, the boundary between private property and public tidelands is an ambulatory line.

Furthermore, the California Constitution contains certain absolute prohibitions on alienation of public tidelands.⁴ Article 10, section 4 of the California Constitution states, in part:

“No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for a public purpose, nor to destroy or obstruct the free navigation of such water...”

Access-ways and Easements

The public can access Broad Beach by two County-owned and operated vertical access ways (which run from Broad Beach Road to the beach and ocean) identified by the Los Angeles County Department of Beaches and Harbors as 31344 and 31200 Broad Beach Road.⁵ The public can also access Broad Beach by walking upcoast along the beach from Zuma County Beach Park. In addition, of the 108 properties, approximately half received Coastal Development Permits for the construction of homes or

TPOA membership but are included in this Cease and Desist Order proceeding. These properties are included because the TPOA has placed unpermitted “private property” signs on the beach on or seaward of these properties; and therefore the Order also requires the TPOA to cease and desist from performing or maintaining unpermitted development on these properties, as well.

² California Constitution Article 10, section 3.

³ Id.

⁴ See footnote 2, Supra.

⁵ The two County-owned, operated and maintained vertical access ways are approximately 20-feet wide and run from Broad Beach Road to the MHTL. The unpermitted fencing is located along the boundary of the access ways toward the ocean, thereby blocking lateral public access from the County access ways and across Broad Beach. At times, the fences may be seaward of the MHTL on State Tidelands.

improvements to homes, which included the provision of lateral public access a certain distance inland of the seaward property line (MHTL), either through a recorded deed restriction or easement for public access and recreational use.⁶

Unpermitted Development

The unpermitted development that is the subject of this proceeding includes the placement of “private property” signs along the length of Broad Beach (see Exhibit #3 and #9 for photographs of signs), and the construction of wooden and metal fencing on the sandy beach seaward of and/or adjacent to the two County owned and operated vertical access-ways (see Exhibit #8 for photographs of fences) both without a Coastal Development Permit and inconsistent with previously issued Coastal Development Permits. In addition, the unpermitted development includes the use of private security guards on ATVs (see Exhibit #7 for photographs of security guard patrols). At times, the signs were placed directly within the public access easements or within the areas deed restricted for public access and passive recreation. In addition, the signs incorrectly purport to measure a certain distance seaward of the unpermitted signs as private property, which, in many cases, has been located in several feet into the ocean (Exhibit #3 and #9). Therefore, not only are the signs unpermitted, but the language on the signs is incorrect, misleading, and has the clear and foreseeable effect of privatizing public areas. Furthermore, even if the signs were not placed within any public access way or deed restricted area, the appearance of a line of “private property/no trespassing” signs installed along the length of Broad Beach gives the impression that the entire beach is private, which it clearly is not. Such activity clearly discourages or prevents public access to and along the beach.

In addition, the use of unpermitted security guard patrols on ATVs was also undertaken without a CDP. The guards on ATVs have directed the public (whether on a public area or not) where they can and cannot sit or walk. In addition, the mere presence of private guards patrolling the beach creates the appearance of a private beach, again, where it is not. These unpermitted guards have also not honored the deed restrictions and easements across the beach by both driving across them as if they were private and not available for public use, and by directing the public away from the public property and public access areas provided for by the deed restrictions and easements.

In order to issue a Cease and Desist Order under Section 30810 of the Coastal Act, the Commission must find that the activity that is the subject of the Order has occurred either without a required coastal development permit (CDP) or in violation of a previously granted CDP.

As addressed more fully within, the unpermitted activity that has occurred on the subject properties clearly meets the definition of “development” set forth in Section 30106 of the Coastal Act. The development was clearly undertaken without a coastal development

⁶ For specific information regarding which properties have easements and deed restrictions and regarding the width and depth of the public access area, see Exhibit #2 and #6.

permit, in violation of Public Resources Code 30600. In addition, and as explained in more detail below, the unpermitted development is also inconsistent with numerous CDPs issued for the construction of single family homes and other development on individual properties along this stretch of Broad Beach, including CDPs that includes lateral public access across portions of their property a certain distance inland of the Mean High Tide Line and/or conditions that explicitly prohibited the placement of “private property” signs on the sandy beach.

II. HEARING PROCEDURES

The procedures for a hearing on a Cease and Desist Order are outlined in Title 14, Division 5.5, Section 13185 of the California Code of Regulations (CCR). For a Cease and Desist Order hearing, the Chair shall announce the matter and request that all parties or their representatives present at the hearing identify themselves for the record, indicate what matters are already part of the record, and announce the rules of the proceeding including time limits for presentations. The Chair shall also announce the right of any speaker to propose to the Commission, before the close of the hearing, any question(s) for any Commissioner, at his or her discretion, to ask of any other party. Staff shall then present the report and recommendation to the Commission, after which the alleged violator(s) or their representative(s) may present their position(s) with particular attention to those areas where an actual controversy exists. The Chair may then recognize other interested persons after which time Staff typically responds to the testimony and to any new evidence introduced.

The Commission should receive, consider, and evaluate evidence in accordance with the same standards it uses in its other quasi-judicial proceedings, as specified in Title 14, California Code of Regulations (CCR) Section 13186, incorporating by reference Section 13065. The Chair will close the public hearing after the presentations are completed. The Commissioners may ask questions to any speaker at any time during the hearing or deliberations, including, if any Commissioner chooses, any questions proposed by any speaker in the manner noted above. Finally, the Commission shall determine, by a majority vote of those present and voting, whether to issue the Cease and Desist Order, either in the form recommended by the Executive Director, or as amended by the Commission. Passage of a motion, per Staff recommendation or as amended by the Commission, will result in issuance of the Cease and Desist Order.

III. STAFF RECOMMENDATIONS

Staff recommends that the Commission adopt the following motion:

Motion:

I move that the Commission issue Cease and Desist Order No. CCC-05-CD-09 pursuant to the staff recommendation.

Staff Recommendation of Approval:

Staff recommends a **YES** vote. Passage of this motion will result in issuance of the Cease and Desist Order. The motion passes only by an affirmative vote of a majority of Commissioners present.

Resolution to Issue Cease and Desist Order:

The Commission hereby issues Cease and Desist Order No. CCC-05-CD-09, as set forth below, and adopts the findings set forth below on grounds that development has occurred without a coastal development permit and that development has occurred in violation of the terms and conditions of CDPs.

IV. FINDINGS FOR CEASE AND DESIST ORDER NO. CCC-05-CD-09

Staff recommends the Commission adopt the following findings of fact in support of its action.

A. Description of Unpermitted Development

The unpermitted development, which is the subject matter of this Cease and Desist Order, includes the placement of “private property” signs along the length of Broad Beach, construction of fencing on the sandy beach seaward of and/or adjacent to the two County operated public vertical access ways (perpendicular to the ocean) at 31344 and 31200 Broad Beach Road, and the use of private security guard patrols on ATVs. This unpermitted development discourages or prevents public access along the beach.

B. Background: Commission’s Actions and History of Violation

During the summers of 2001 to 2003, Commission staff received complaints from beachgoers that they were harassed, intimidated, and, at times, forced to leave Broad Beach by the private security guard patrols on ATVs employed by TPOA. Commission staff reviewed the complaints and it became evident that many of these beachgoers were either on public tidelands, on public access easements, or on land deed restricted for public access. Under State law, all lands seaward of the MHTL are owned by the state and held in trust for the public. As a result, the public has the legal right to use and enjoy the beach seaward of the MHTL. In addition, TPOA has placed unpermitted “private property” signs along Broad Beach that state, “Private Property/Do Not Trespass” and purport to measure private property a certain distance seaward of the

signs (generally 20 to 60 feet seaward).⁷ In addition to being unpermitted, as discussed above, the placement of the signs violates public access easements and areas deed restricted for public access as required by numerous CDPs. Furthermore, several CDPs issued for development along Broad Beach explicitly prohibited the placement of signs on the beach without a CDP. The placement of the “private property” signs by the TPOA was in direct violation of those CDPs.

After conducting several site visits, researching the history of the unpermitted activity, and reviewing the numerous complaints and reports from members of the public, Commission staff opened a violation case in September 2002. During these site visits at Broad Beach, Commission staff surveyed the number and location of the unpermitted “private property” signs. Commission staff noted that the signs were, and continue to be, moved periodically both laterally and vertically across the beach. In addition, the distance of land the signs purport to measure as private property changes and have been observed to range between 15 and 70 feet and change from month to month.

In addition, Commission staff discovered that the language of the signs inaccurately describes the area of public property by claiming that a certain distance seaward of the signs is private. During site visits, Commission staff measured the purported distance (again, ranging between 15 to 70 feet) indicated on the unpermitted signs and found that at most times the measurement included beach areas that were under ocean water. Any such sign placed on or seaward of properties where there is a public access easement or deed restriction, would clearly misrepresent such lands as private. As noted above, several CDPs for development on properties along Broad Beach included conditions explicitly prohibiting signs on the beach (Exhibit #15). Any placement of “private property” signs on or seaward of these properties is in violation of those CDP requirements.

On June 23, 2004, in response to numerous reports from the public and based on Commission staff research, that private property signs and security guards on ATVs have been used at Broad Beach, which discourage or prohibit the public’s right to use Broad Beach, the Executive Director sent the TPOA a letter addressing the unpermitted activity at Broad Beach (Exhibit #11).⁸ The letter provided background information

⁷ Commission staff has observed during numerous site visits that the unpermitted “private property” signs are removed entirely, replaced, and moved to from property to property from one month to the next. At times there are no signs on the beach and at other times, typically during the summer months (a time of heaviest public beach use) there are up to approximately 35 signs. For example, in June 2003 there were 29 signs, in July 2004 there were 35 signs, in April 2004 there were 15 signs, in January 2005 there were 2 signs, and during other times there are no signs located on Broad Beach. The placement of signs also changes location from property to property from month to month and year to year. For example, there was no sign on or seaward of 31316 Broad Beach Road in June 2003 and April 2004 but there was a sign there in September 2002. From observations and site visits over time, it is evident that many properties have had signs in some years, and not in others. It is not clear why TPOA has put up signs at any place at any time, but it is clear that the locations have varied widely.

⁸ A similar letter was sent to eight individual property owners who, at the time of writing, had an unpermitted “private property” sign on or seaward of their property which was also inconsistent with the

regarding the Coastal Act's protection of coastal resources, including public access, and discussed Commission staff's concern that the placement of these "private property" signs and the use of private security guards patrolling the beach on ATVs discourage and sometimes prohibit the public's right to enjoy this stretch of beach. The letter explained that there are numerous public access easements along Broad Beach in addition to the public land that the public has the right to enjoy and use below the MHTL, the State tidelands held in trust for the public. Finally, the letter requested the removal of such signs and that the TPOA discontinue the practice of employing ATVs to discourage public use at Broad Beach.

In a June 28, 2004 letter, instead of responding directly to the Executive Director, Marshall Grossman, Board Member of the TPOA, and acting as a representative for the TPOA, sent a letter to Commissioner Steve Kram requesting a meeting to discuss the enforcement matter (Exhibit #13).⁹

In a letter of July 1, 2004 in response to the June 23, 2004 letter, Mr. Grossman raised many of the same defenses that are raised in the Statement of Defense form submitted for this proceeding (Exhibit #3), including the assertions that the "private property" signs and use of private security patrols on ATVs predate the Coastal Act, that there is a confusion over where private property and public property is located, and that the private security guards do not impact public access (Exhibit #17).¹⁰ Mr. Grossman's letter also indicated that the TPOA would like to resolve the issues amicably.

Subsequent to this time, Commission staff and representatives of the TPOA, including Mr. Grossman, met to discuss the possibilities of reaching an overall settlement agreement to resolve the violations. In addition, several correspondences were exchanged regarding a possible settlement and draft settlement proposals. During most of this time, however, unpermitted signs remained on the beach and security patrols on ATVs continued to drive across the beach (including areas restricted for public access and passive recreation).

public access easements or deed restrictions which were recorded on their property pursuant to their CDP requirements. These property owners were not included in this proceeding because we have discovered that the TPOA was the entity that placed the unpermitted development. However, individual property owners are responsible for actions that occur on their property and for complying with CDP conditions and the Coastal Act, and may be subject to future enforcement action, including potential fines and penalties under Chapter 9 of the Coastal Act for violating the Coastal Act and for violating terms and conditions of previously issued CDPs.

⁹ It should be noted that this is an enforcement matter and the rules and procedures applying to such matters are different from those for permitting matters, and restrict Ex Parte communications.

¹⁰ This report responds to these defenses, as well as other defenses raised by the TPOA in their Statement of Defense, in Section F, below.

Therefore, Pursuant to Section 13181, Title 14, Division 5.5 of the California Code of Regulations, on August 18, 2004¹¹, the Executive Director provided the TPOA a *Notice of Intent to Commence Cease and Desist Order Proceedings* (NOI) (Exhibit #12).¹² The NOI sent to TPOA responded to the allegations raised in Mr. Grossman's July 1, 2004 letter, including a thorough explanation of why the TPOA has no vested right to the unpermitted "private property" signs and the unpermitted private security guard patrol and the reasons why the subject activity is development under the Coastal Act and was undertaken without a CDP.

The NOI states:

This letter is to also notify you of my intent, as the Executive Director of the California Coastal Commission ("Commission"), to commence proceedings for issuance of a Cease and Desist Order for unpermitted development, should this not be resolved in a timely fashion. As noted above, the unpermitted development consists of private property signs, fencing seaward of the two County vertical access easements, and use of private security guards on All-Terrain-Vehicles on and along Broad Beach.

The purpose of this enforcement proceeding is to resolve outstanding issues associated with the unpermitted development activities that have occurred on and along Broad Beach. The Cease and Desist Order will direct you to cease and desist from performing or maintaining any development that is inconsistent with a previously issued CDP and/or subject to the permit requirements of the Coastal Act without a CDP and to compel the removal of the private property signs and fencing from the beach and to discontinue the use of private security guards on ATVs.

In accordance with Sections 13181(a) of the Commission's regulations, the TPOA was provided the opportunity to respond to the Commission staff's allegations as set forth in NOI by completing a Statement of Defense form (hereinafter "SOD"). The TPOA was required to submit the SOD form by no later than September 7, 2004. Subsequent to this time, Commission staff and the TPOA entered ongoing settlement discussions. Throughout this time the TPOA submitted several requests to extend the deadline to

¹¹ After reviewing the enforcement files, Commission staff discovered that the "Domestic Return Receipt" from the August 18, 2004 NOI to the TPOA was not signed and returned to our office. Therefore, in an excess of caution and to ensure formally that Commission staff properly notified the TPOA of the possibility of a Cease and Desist Order proceeding, on March 10, 2005, Commission staff re-sent the NOI. Commission staff updated the dates and revised the deadline to submit the Statement of Defense form (SOD). Commission staff noted in the cover letter to the NOI that this was merely a formality and did not represent any new action by the Commission.

¹² In addition to the TPOA, the Executive Director sent a *Notice of Intent to Commence Cease and Desist Order Proceedings* to six individual property owners to address unpermitted "private property" signs on or seaward of their property, which were inconsistent with public access easements or restrictions recorded on their property. This Cease and Desist Order proceeding only addresses the TPOA as the party who conducted the unpermitted development.

submit the SOD. The Executive Director granted seven deadline extensions to allow for continued discussions to occur, in the attempt to resolve the violations amicably.

Because it became clear that Commission staff and the TPOA could not resolve the violations through a consensual agreement, Commission staff eventually notified the TPOA that the proceedings for a cease and desist order would occur at the Commission's August 2005 hearing. On June 25, 2005, Commission staff received a Statement of Defense from the TPOA in response to the NOI (Exhibit #3). These defenses and Commission staff's response to those defenses are addressed in *Section F* of this Staff Report.

Commission Action on Coastal Development Permits along Broad Beach

As a condition to CDPs for remodeling existing homes or constructing new homes on Broad Beach, many property owners provided lateral public access and passive recreation across their property from the MHTL or daily high water mark a specified distance¹³ inland by recording either Offers to Dedicate a public easement (hereinafter "OTDs"), deed restrictions, or Quit Claim deeds, or by acceptance of public access requirements. The California State Lands Commission has accepted all 38 OTDs and the one Quit Claim deed. Once accepted, these became legal easements benefiting the public. In addition, deed restrictions on other properties provide public access and passive recreation automatically and, like the public access easements, were recorded in the chain of title for each property.

It should be noted that any aggrieved person has the right to seek judicial review of any decision or action by the Commission by filing a petition for writ of mandate within 60 days after the decision or action of the Commission has become final. If the challenge is not made in a timely manner (within 60 days after the decision or action of the Commission has become final) the Commission action is final and is barred from court challenge. No property owner along Broad Beach challenged the Commission decision on his or her CDP (including those permits involving public access provisions or "no sign" conditions) within the 60 days.¹⁴ Therefore, all CDPs issued for development along Broad Beach and any conditions, including those that included public access easements and deed restrictions on property landward of the MHTL or daily high water

¹³ For detailed description of each individual public access easement or deed restriction, see Exhibit #2 and #6 of this Staff Report.

¹⁴ TPOA, along with several individual property owners, filed a lawsuit against the Commission challenging the access easements and to date, this suit has been unsuccessful. In July 2004, the Superior Court ruled that challenges to the lateral access easements on Broad Beach are barred by the statute of limitations because the property owners accepted the coastal permits and recorded the required offer to dedicate an easement, without filing a timely legal challenge to the easement requirement. (*Trancas Property Owners Assn. et al. v. State of California, et al.* (Los Angeles Superior Court, Case BC 309893). TPOA is appealing this decision. As discussed further intra, there are other court decisions holding as did the TPOA trial court.

mark and the conditions that explicitly prohibited signs on or seaward of properties, are final and binding and can no longer be challenged.

The signs on Broad Beach purport to denote private property a certain distance seaward of the unpermitted signs (Exhibit #3). The MHTL that constitutes the boundary between public and private property is ambulatory, due to the fact that the elevation of the land in the intertidal zone of the beach is constantly changing. Accordingly, the location where the MHTL (an elevation above sea level) intersects with the beach changes over time. The signs that purport to identify the location of the MHTL on the beach are therefore inaccurate and misleading. Although the MHTL may have been at the designated location when the sign was placed, after hours or days have gone by, the sign will no longer accurately identify the location of the MHTL. We note that the State Lands Commission has not designated a fixed location of the boundary between public tidelands and private property on Broad Beach and the State Lands Commission has not approved or authorized the placement of the "private property" signs along Broad Beach.

During a September 10, 2003 site visit, Commission staff measured the distance indicated on every unpermitted sign on Broad Beach to determine how far seaward the TPOA was purporting to designate land as private. In many cases, the measurement terminated in beach area covered in approximately one to two feet of ocean water. Based on observations of the signs on numerous dates and at various tide conditions, it appears that land that the signs purport to identify as private ownership includes land that constitutes public tidelands (i.e. seaward of the MHTL) and/or is land subject to the public access easements and deed restrictions identified above. TPOA has placed private property signs on parcels where there is a public access easement or deed restriction for public access.

Malibu Local Coastal Program

The Commission adopted the City of Malibu's Local Coastal Program (hereinafter "LCP") in September 2002 and it became legally applicable. Within this LCP, section 3.16 provides in relevant part that on environmentally sensitive dune habitat, vehicle traffic is "strictly prohibited". In areas not located in the identified dune habitat, section 3.17 states, in part:

"Access to beach areas by motorized vehicles, including off-road vehicles shall be prohibited, except for beach maintenance, emergency or lifeguard services. Emergency services shall not include routine patrolling by private security forces." (emphasis added)

The unpermitted private security guard patrols on ATVs or other motorized vehicles driven along a beach area with sensitive dune habitat violates this section of the Malibu LCP. Even if the private security guard patrols did not drive within the dunes, the Malibu LCP explicitly prohibits motorized vehicles on the beach for "patrolling by private

security forces". In areas outside of the coastal zone governed by Malibu's LCP, local and State laws also restrict ATVs on the beach.

The Malibu Municipal Code, section 12.08.110 provides that no person shall "bring to or operate in any park any motor vehicle" except as permitted in writing from the city manager or by permit. In any beach areas under the jurisdiction of the City of Malibu, this restriction on vehicle use applies. Specifically regarding beach rules and regulations, the City in Municipal Code section 12.08.020 incorporated by reference the Los Angeles County Code of Regulations Title 17.

The City of Malibu adopted the Los Angeles County Code of Regulations Title 17, which effectively make the County regulations of vehicle use on beach the law governing Malibu beaches. Malibu Municipal Code 12.08.202. Effectively, the code restricts ATVs on a Malibu beach to only those permitted by the city manager. Therefore, unless a property owner possesses a permit from the City of Malibu for operating their ATV on the beach, usage is prohibited. No such permit has been issued.¹⁵

In addition, the State of California Department of Parks and Recreation regulates the state beaches of Malibu Lagoon and Malibu Creek. California Code of Regulations Title 14 section 4355 restricts vehicle operation within state parks to roads and parking areas. Section 4352 further regulates off-highway vehicles, providing "no person shall operate an off-highway vehicle ... except in designated units or portions thereof." The only "designated units" wherein such off-road vehicles are permitted are listed in the California Department of Motor Vehicles Title 13, section 2415. No beaches in Malibu are listed in section 2415.

C. Basis for Issuance of Cease and Desist Order

The statutory authority for issuance of this Cease and Desist Order is provided in §30810 of the Coastal, which states, in relevant part:

- a) If the Commission, after public hearing, determines that any person...has undertaken, or is threatening to undertake, any activity that 1) requires a permit from the commission without first securing the permit or 2) is inconsistent with any permit previously issued by the Commission, the Commission may issue an order directing that person...to cease and desist.*
- b) The cease and desist order may be subject to such terms and conditions as the Commission may determine are necessary to ensure compliance with this division, including immediate removal of any development or material...*

¹⁵ Even if it had, however, Title 17 does not supersede the absolute provision within the LCP of restricting ATV use nor does it supersede the provisions of the Coastal Act.

The following paragraphs set forth the basis for the issuance of the Cease and Desist Order by providing substantial evidence that the development meets all of the required grounds listed in Section 30810 for the Commission to issue a Cease and Desist Order.

i. Development has Occurred without a Coastal Development Permit

Section 30600(a) of the Coastal Act states that, in addition to obtaining any other permit required by law, any person wishing to perform or undertake any development in the coastal zone must obtain a coastal development permit ("CDP"). "Development" is defined by Section 30106 of the Coastal Act as follows:

*"Development" means, on land, in or under water, **the placement or erection of any solid material or structure**; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; **change in the density or intensity of use of land...change in the intensity of use of water, or of access thereto**...and the removal or harvesting of major vegetation other than for agricultural purposes... (emphasis added).*

The unpermitted development that is the subject of this Cease and Desist Order meets the definition of "development" contained in Section 30106 of the Coastal Act. In this case, the placement of "private property" and/or "no trespassing signs that purport to denote private property, the placement of fencing on the sandy beach seaward of and/or adjacent to the two County-owned, operated, and maintained vertical access easements at 31344 and 31200 Broad Beach Road, are the placement of a solid material or structure. In addition, the placement of "private property" and/or "no trespassing signs that purport to denote private property, the placement of fencing seaward of the two County-owned, operated, and maintained and the use of private security guard patrols on ATVs, which impede or prevent public access to and along the ocean, change the intensity of use of land and change the intensity of use of water or of access thereto. Therefore all the subject unpermitted development constitutes "development" as defined by Section 30106 of the Coastal Act and therefore may not be installed, maintained, or used unless such development is authorized in a CDP.

Many of the reports occurring between 2001 and 2003 have indicated that the private security guard patrols that drive ATVs on the beach have directed the public to leave the beach, claiming that the entire beach is private property. This action changes the intensity of use of the beach and ocean by affecting access to State waters and the public access easements and deed restricted areas. In addition, the guards appear to instruct people to leave the beach without regard to whether they are on state tidelands, public access easements owned by the State, or land deed restricted for public access. This activity prevents the public from using areas of the beach where there is a right to public beach access provided by CDPs issued by the Commission and by state law. This activity constitutes a change in the ability of the public to access public tidelands and to use Broad Beach for recreation.

Moreover, the use of the security guards on ATVs adversely impacts the use of the beach by visitors who are on public tidelands or in areas where there is a right to use the beach inland of the MHTL, even if they are not told to relocate or leave. The use of the security guards on ATVs creates noise that reduces enjoyment of the beach by the public and causes concern over being in the pathway of an oncoming ATV that may not be able to see a person lying on the sand. The use of the security guard patrols on ATVs creates an unwelcoming atmosphere for non-resident visitors that reduce a visitor's enjoyment of the beach and may be a deterrent to use of Broad Beach in the future.

Section 30600(a) of the Coastal Act requires that any person wishing to undertake "development" must obtain a coastal development permit. In this case, TPOA has undertaken all of the above-mentioned development without applying for or obtaining a coastal development permit.

The above-mentioned unpermitted development is not exempt from the Coastal Act's permitting requirements under Section 30610 of the Coastal Act and Section 13250-13253, California Code of Regulations, Title 14 (hereinafter "Commission's Regulations"). Section 30610 of the Coastal Act provides that certain types of development are exempt from the CDP requirements. In this case, the only potentially applicable exemption is Section 30610(a) regarding improvements to existing single-family homes. However, this exemption does not apply here because the subject properties are located in an area that is explicitly excluded from these exemption policies since they are located on a beach. Therefore, pursuant to Section 13250(b)(1) of the Commission's regulations, no exemption applies for the unpermitted development.

ii. Development has Occurred that Violates Coastal Development Permits

TPOA has undertaken development that also violates Commission approved CDPs authorizing development on Broad Beach. Approximately one half of the property owners along the subject properties have CDPs with conditions which explicitly provide for lateral public access at least 25 feet inland of the MHTL (Exhibit #6). Approximately 15 of these CDPs also included conditions that explicitly prohibit the placement of "private property" signs on the beach, or require a CDP or CDP amendment for posting of any signs on the property (Exhibit #15). The use of signs, fencing, and private security guards on properties that are subject to conditions that grant a public right to use the beach inland of the MHTL or which prohibited signs or require CDPs for signs are in direct conflict with the access conditions of these CDPs. As noted above, TPOA has placed "Private Property/Do Not Trespass" signs on property where there is a public right to use the beach inland of the MHTL. At times, TPOA has placed as many as 30 to 40 "Private Property/Do Not Trespass" signs along this approximately one-mile stretch of Broad Beach. This continuous row of signs -- even if none of them were located on parcels subject to a permit condition for lateral public access -- has and would convey the message that the entire length of Broad Beach is private and no

public use of the beach is allowed (For an example of this, see Exhibit #10). The continuous row of signs conveys this message for all properties along Broad Beach, including the properties where there is a right to public lateral access inland of the MHTL. Accordingly, these signs interfere with and prevent public use of the areas adjacent to and inland of the MHTL that the CDPs provide are to be available for public use. Therefore, the signs appear to constitute a violation of these CDPs, even if the signs themselves are not located on parcels where there are rights to access.

Additionally, it appears that the practice of TPOA has been to periodically relocate the “Private Property/Do Not Trespass” signs to different properties along Broad Beach, without regard to specific conditions of the CDP applicable to the property. This practice has and can result in placement of signs in violation of the CDPs containing conditions that prohibit private property signs on the beach or require a CDP or CDP amendment for posting any signs on the property.

Finally, use of private security guards on ATVs has interfered with and prevented use of areas adjacent to and inland of the MHTL where the CDPs grant a right to public use. Therefore this activity violates the public access conditions of these CDPs. The signs, fencing and private security guard patrols are in direct conflict with the intent of the CDP conditions that were imposed to protect the public’s ability to access public tidelands and the sea.

Vested Rights Analysis

The TPOA has alleged in their SOD (discussed further, herein) and in several correspondence that they have a “vested right” to place “Private Property/Do Not Trespass” signs and operate private security guards on ATVs along the beach. Initially, to make the determination that development was conducted prior to the Coastal Act, the person making such an assertion must submit a Claim of Vested Rights to the Commission. In such a proceeding, the claimant has the burden of proving the facts that are necessary to establish a vested right. (See Title 14, California Code of Regulations, sections 13200 and 13201). Neither the TPOA nor any other party has ever submitted such a claim. However, the following analysis is provided to address the TPOA’s allegation and to apply the legally applicable criteria to the facts in this case. This discussion is explained further in the responses to the SOD, *Section F* of this report.

When the Commission considers a claim of vested rights, it must apply certain legal criteria to determine whether a property owner has a vested right for a specific development. For background purposes, these criteria are described below:

1. The claimed development must have received all applicable governmental approvals needed to complete the development prior to the effective date of the Coastal Act. Typically this would be a building permit, grading permit, Final Map, Health Department approval for a well or septic system, etc. or evidence that no permit was required for the

claimed development. (*Billings v. California Coastal Commission* (1988) 103 Cal.App.3d 729, 735).

2. If work was not completed prior to the Coastal Act, the claimant must have performed substantial work and/or incurred substantial liabilities in good faith reliance on the governmental authorization received prior to that date (or lack of a required governmental authorization). (*Tosh v. California Coastal Commission* (1979) 99 Cal.App. 3d 388, 393; *Avco Community Developers, Inc. v. South Coast Regional Commission* (1976) 17 Cal.3d 785).

3. The burden of proof is on the claimant to substantiate the claim of vested right. (Title 14, California Code of Regulation, Section 13200). If there are any doubts regarding the meaning or extent of the vested rights exemption, they should be resolved against the person seeking the exemption. (*Urban Renewal Agency v. California Coastal Zone Conservation Commission* (1975) 15 Cal.3d 577, 588).

4. A narrow, as opposed to expansive, view of vested rights should be adopted to avoid seriously impairing the government's right to control land use policy. (*Charles A. Pratt Construction Co. v. California Coastal Commission* (1982) 128 Cal.App.3d 830, 844). In evaluating a claimed vested right to maintain a nonconforming use (i.e., a use that fails to conform to current zoning), courts "follow a strict policy against extension or expansion of those uses." (*Hansen Bros. Enterprises v. Board of Supervisors* (1996) 12 Cal.4th 533, 568). "It is the general purpose to eventually end all nonconforming uses and to permit no improvements or rebuilding which would *extend the normal life* of nonconforming structures." (*Sabek, Inc. v. County of Sonoma*, (1987) 190 Cal.App.3d 163, 168).

5. Section 30608 of the Coastal Act does not allow a substantial change to a vested development without obtaining prior approval pursuant to the requirements of the Coastal Act.

6. If a vested right for development is found, then a question may arise whether recent activities to repair, replace or reconstruct such development qualify for the Coastal Act exemption for repair and maintenance to existing development in Section 30610(d). Under the Commission's regulations, exempt repair and maintenance is distinguished from replacement with new development, which is *not* exempt. Title 14, California Code of Regulations, section 13252(b) states: "the replacement of 50 percent or more of a single family residence, seawall, revetment, bluff retaining wall, breakwater, groin or any other structure *is not repair and maintenance under Section 30610(d) but instead constitutes a replacement structure requiring a coastal development permit.*" (emphasis added).

These detailed standards and criteria demonstrate that numerous issues are involved in a vested rights determination. The Commission should reject the respondents' attempt to raise a claim of vested rights as a defense in this enforcement action, when they

have failed to follow the procedures for seeking such a determination by the Commission. If TPOA wished to submit a Vested Rights application, they have had years to do so and failed to do so.

Nevertheless, for the reasons discussed below, even if they has applied for a Vested Rights Determination, which they have not, the facts do not support a claim of vested rights.

A. Signs

For example, to qualify as vested, the development must have received all necessary governmental approvals to complete the development prior to February 1, 1973 (the effective date of the Coastal Zone Conservation Act of 1972). The signs at issue purport to delineate the line between State property and private property (the Mean High Tide Line or MHTL). This boundary between public tidelands and private property is moving constantly and a survey can only identify the boundary for any one particular time at any one particular day; and the difference in this boundary from one day to the next could be considerable. It is not possible for the private property signs to accurately depict the mean high tide line at all times, since this boundary is ambulatory from day to day. In California, lands located seaward of the Mean High Tide Line constitute public tidelands that are owned by the State and held in trust for the public. (California Civil Code section 670.). The public has the legal right to use these public tidelands.

Moreover, the State Lands Commission has the regulatory authority over public tidelands and making determinations regarding the location of public tidelands. The signs along Broad Beach were not authorized by the State Lands Commission prior to February 1, 1973, or at any time thereafter. Accordingly, the signs did not receive all required governmental approvals prior to the effective date of the Coastal Act. Therefore, even if the signs existed prior to February 1, 1973, they are not exempt from the permit requirements of the Coastal Act.

Second, another essential criteria for establishing a vested right is that it must be shown that there has not been any “substantial change” in the development (Title 14, California Code of Regulations section 13207; Public Resources Code section 30608). From Commission staff’s observations and historic aerial photographs, it is clear that there has been a number of “substantial changes”, including the fact that the number and location of the signs along Broad Beach have changed often over time. To establish a vested right, TPOA must prove that a specific number of signs on specific properties existed prior to February 1, 1973; any subsequent increase or decrease in the number of signs placed along the beach or the properties they were placed on would be a “substantial change” that could not occur unless it was authorized in a CDP. TPOA must also establish that signs placed on Broad Beach in recent years contain the same

message that was present on signs that were placed on the beach prior to the Coastal Act.¹⁶

Another criteria for establishing a vested right is that it must be shown that the claimant incurred substantial liabilities in good faith reliance on the lack of a required governmental authorization prior to the Coastal Act. TPOA cannot establish a vested right because it did not incur substantial liabilities in good faith reliance on the absence of regulation over placement of private property/do not trespass signs on Broad Beach prior to February 1, 1973. TPOA did not incur substantial expenses for purchase or installation of the signs. As noted in the 1966 News Letter, the association income from dues that year was \$1,005 and expenditures were only \$787. If this included expenditures for signs, this is not a substantial investment. In 1969, the annual dues of the association were \$25, which would result in approximately \$2,700 if every one of the 108 parcel owners contributed -- again, this does not represent a substantial sum available for expenditure on signs. In 1971, the association minutes indicate that a surveyor proposed to charge \$400-500 for an initial survey and \$100 for subsequent surveys. This also would not represent a substantial expenditure (particularly since the expenditures came from small dues payments made by numerous property owners). The lack of any substantial expenditure prior to the effective date of the Coastal Act is also supported by the fact that any signs that were purchased before the Coastal Act have already provided full value and had to be replaced with new signs. There is no evidence that TPOA incurred substantial liability that entitles them to rely on the absence of regulation prior to 1973 to re-install signs every year without ever complying with new laws or regulations. Rather, this is a case where continuing the sign placement requires TPOA to incur ongoing, continuing expenses for sign replacement, installation and surveys. In this situation, there are no equitable reasons for finding a vested right. Moreover, given the intermittent, recurring nature of the activity (removal of the signs each year and placement again the next year), TPOA could not reasonably expect to re-install the signs each year and be exempt forever from all new laws or regulations. Basically, once the activity was completed and the signs were removed at the end of the season, placement again the following year constitutes a new activity

¹⁶ The 1966 News Letter and 1969 letter that TPOA submitted do not establish the number and location of signs that TPOA placed on Broad Beach prior to the Coastal Act. The 1966 document states that ten additional "No Trespassing" signs were put up that year. However, there is no indication of how many signs were already in use. These documents refer to signs that only state "No Trespassing", and therefore this cannot establish a vested right for the signs containing additional information that TPOA has placed on the beach in recent years. The minutes of the homeowners association meeting in 1971 that TPOA provided allude to hiring a "surveyor" and the placement of "markers" every three hundred feet. The minutes do not indicate if or when this placement of markers occurred, or the exact location of any such markers or signs or the number of markers or signs. TPOA also provided minutes of a meeting from April 1972 that was held to "settle on the wording for the signs to be placed on the ocean side of our property..." Likewise, there is no evidence indicating when such placement of signs occurred or where they were placed. TPOA has not provided any photographs showing signs on the beach prior to February 1, 1973. No signs are visible in aerial photographs of Broad Beach from 1972. The documentation that TPOA provided is too vague and ambiguous with respect to both the date of installation, the number of such signs, and their location, to meet TPOA's burden of proving the vested right for the placement of signs that it is asserting.

(i.e., "new development") that is not exempt from the requirements of the Coastal Act in effect at the time of the new placement of signs.

We note that there are approximately 108 separate parcels on Broad Beach Road, but private property signs have never been present on the vast majority of these parcels at any one time. There is no evidence that such signs were present on any one particular parcel prior to February 1, 1973. Rather, the evidence shows that signs have been periodically moved from one parcel to another, and from one location on a particular parcel to another. If TPOA did provide evidence showing that a sign was present on a particular parcel prior to the Coastal Act (which it has not done), it still could not move the sign to a different parcel that did not previously have a sign unless this was authorized in a CDP.

The signs on Broad Beach have been moved vertically and laterally across the beach, at times have been completely removed from the beach, and have also been replaced by new signs at various times since February 1, 1973. For example, during a survey of the signs by Commission staff on April 5, 2004, staff noted that there were 15 signs present on various locations of Broad Beach. Approximately 3½ months later, on July 20, 2004, Commission staff counted 38 signs located on various locations of Broad Beach. At various times all the signs have been removed from Broad Beach. After the signs were removed, any vested right was lost and the signs could not be re-installed on Broad Beach unless this was authorized in a CDP. Both removal of the signs and continual changes in the location, number, and language of the signs constitute "substantial changes" to any vested development and therefore are not exempt. In addition, the signs purport to delineate lands seaward of the signs as private at varying distances throughout the time the signs are on the beach. For example, one month an individual sign might state that land 20 feet seaward of the sign is private property and at another time the same sign might state that land 60 feet seaward is private property.¹⁷ Therefore, even if the signs were not moved vertically and laterally along and across the subject properties, the land that the signs purport to describe as private changes. This further defeats any claim of a vested right, since the change in information on the sign represents a substantial change that is not exempt from the permit requirements of the Coastal Act.

The signs that TPOA placed on Broad Beach in recent years are not the same signs that TPOA asserts were present in 1973. Rather, new signs have been installed subsequent to February 1, 1973. The installation of new signs constitutes "new development" that is not exempt from the CDP requirements of the Coastal Act.

TPOA's claim of vested rights can only be interpreted as a claim of a generalized right to place and replace an unlimited number of signs at various, changing locations on

¹⁷ Staff notes that even if the language of the signs were consistent and did not change the amount of land purported as private, the signs are still unpermitted and inaccurately and illegally attempt to delineate the boundary between private and public property.

Broad Beach. There cannot be a generalized vested right for development that is undefined and constantly changing over time.

It should also be noted that, for the parcels where the owners granted a right of public access to the public, any vested right that may have existed to post private property signs that purport to apply to such access areas has been superseded by the grant of access. As discussed above, subsequent to February 1, 1973, the owners of approximately 52 parcels on Broad Beach granted a public right of lateral access inland of the MHTL on their property. The grant of access by the property owners in an easement or deed constitutes surrender or abandonment of any pre-existing vested right that may have existed for signs to be placed or maintained on the property purporting to indicate that the beach is private and no public access is allowed since it is clearly inconsistent with the grant of access.

B. Fences

There is no evidence that the fences currently in place on the sandy beach seaward of and/or adjacent to the two County vertical access ways were there prior to the Coastal Act. In addition, Commission staff has confirmed that the fencing seaward of and/or adjacent to the County vertical public access ways that impede lateral public access along Broad Beach have been removed, re-installed, added to, and/or extended over the years. Aerial photographs of Broad Beach from 1972 do not show fencing in this location and TPOA has not provided any documents indicating that these fences existed prior to the Coastal Act. (The eastern County access way on Broad Beach was not even opened until after 1973). Also, as noted above, even in cases where there is vested development, which appears not to be the case here, the replacement of vested development, or any substantial change in such development, is not exempt from the permit requirements of the Coastal Act (Public Resources Code section 30608; and Title 14, California Code of Regulations section 13207). The removal, re-installation, extension and addition to the fencing along the County access ways constitutes a substantial change to the vested development and/or new development that is not exempt from the permit requirements of the Coastal Act.

C. Private Security Guard Patrols

There is also no evidence that the private security patrols on ATVs existed prior to the Coastal Act. In fact, ATVs were not readily available and did not enter the market until the early 1970's and were not in common usage prior to the Coastal Act. In their SOD, the TPOA states, "[the patrol] was originally on foot and in later years on both foot and all terrain vehicles ('ATVs')." Even the TPOA admits that they did not use private security guard patrols prior to the Coastal Act, which is clearly a threshold requirement to a vested rights claim.

As discussed above, an essential criteria for establishing a vested right is that it must be shown that there has not been any "substantial change" in the development. In this

case, a change from foot patrols to patrols driving along the beach on mechanized equipment clearly is a substantial change in the activity. In addition, during the time the TPOA employed the private security guard patrols, the patrols were infrequently utilized. The TPOA has stated that the private security guard patrols are typically only on the beach during the summer months. Therefore, the TPOA does not have a vested right to use the patrols on ATVs now and the private security guard patrols are not exempt from the permit requirements of the Coastal Act.

In addition, as explained above, even if they had used ATVs prior to the Coastal Act, and even if they had proven they did not make any substantial changes, it must also be shown that a vested right claimant incurred substantial liabilities in good faith reliance on the lack of a required governmental authorization prior to the Coastal Act. TPOA cannot establish a vested right because it did not incur substantial liabilities in good faith reliance on the absence of regulation over use of private security guard patrols along Broad Beach prior to February 1, 1973. TPOA did not incur substantial expenses for the patrols. As noted in the 1966 News Letter, the association income from dues that year was \$1,005 and expenditures were only \$787. If this included expenditures for security guard patrols, this is not a substantial investment. In 1969, the annual dues of the association were \$25, which would result in approximately \$2,700 if every one of the 108 parcel owners contributed -- again, this does not represent a substantial sum available for expenditure on security guard patrols. In 1971, the association minutes indicate that a patrol service would receive \$240 a year to patrol Broad Beach. This also would not represent a substantial expenditure.

Furthermore, for the parcels where the owners granted a right of public access to the public, any vested right that may have existed to patrol that portion of the beach has been superceded by the grant of public access. As discussed above, subsequent to February 1, 1973, the owners of approximately 52 parcels on Broad Beach granted a public right of lateral access inland of the MHTL on their property. The grant of access by the property owners in an easement or deed constitutes surrender or abandonment of any pre-existing vested right that may have existed for private security patrols to impede or prohibit public access in these locations since they are directly in conflict with the public access provisions.

Inconsistent with Resource Policies of the Coastal Act

It should be noted that this is not an element which is required for issuance of a cease and desist order. That is, the Commission does not have to find that the unpermitted development is inconsistent with the Malibu Local Coastal Program (hereinafter "LCP") or the Chapter 3 Policies of the Coastal Act to issue Cease and Desist Orders under the Coastal Act (Section 30810). However, this section is provided as background information. Commission staff notes that the unpermitted development is, in fact inconsistent with the public access, recreation, and scenic resource policies of the Coastal Act

The protection of coastal access and recreation is one of the major policy goals of the Coastal Act as provided for in Sections 30210, 30211, 30220, 30221, and 30240 of the Coastal Act. In addition, the Coastal Act was designed to protect the scenic and visual qualities of coastal areas as a resource of public importance (Section 30240 and 30251 of the Coastal Act). This development appears to be inconsistent with these Coastal Act policies.

i. Access and Recreation

Section 30210: Access; recreational opportunities; posting

In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

Section 30211: Development not to interfere with access

Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

Section 30220: Protection of certain water-oriented activities

Coastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses.

Section 30221: Oceanfront land; protection for recreational use and development

Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.

Section 30240: Environmentally sensitive habitat areas; adjacent developments

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which

would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.

As noted above, this stretch of Broad Beach is located immediately upcoast of Zuma County Beach Park in Malibu and is a popular and heavily used recreational beach area. Two 20-foot wide County-owned, public vertical access ways allow unimpeded access from Broad Beach Road to the beach and ocean. These access ways are operated and maintained by the Los Angeles County Department of Beach and Harbors. As also noted above, the public has the legal right to access all lands below the MHTL, which is an ambulatory line often separating public and private property. In addition, 52 of the approximately 108 properties along Broad Beach have also provided, via easements and deed restrictions, areas at least 25 feet inland of the MHTL for public access and passive recreation (Exhibit #2 and #6). Therefore, there is a large area along Broad Beach for the public to enjoy and use.

The placement of the private property signs and fencing and the use of private security guards patrolling the beach on ATVs discourage and sometimes prevent members of the public from enjoying their right to use this stretch of beach (some of which is held in trust by the State for public use). The Coastal Act was established to protect California's spectacular coastal resources, including the public's ability to access and enjoy California's beaches. The protection of public access to the beach and ocean is one of the fundamental purposes and a principal goal of the Coastal Act.

The private property signs and fencing that were placed on the beach and the use of private security guards on ATVs without a Coastal Development Permit both give the impression that the entire beach is private. The signs state: "Private Property" and "Do Not Trespass." They also state: "Penal Code Section 602(N)." In addition to this, given the placement of the signs and the large number of footage referred to on the signs, these signs give the clear and inaccurate impression that the land seaward of the signs and even the ocean area fronting the subject properties are privately owned and not for the use of the public.¹⁸ They indicate to someone who is on the beach and reads the sign that they are breaking the law and even gives the impression they are committing a crime by being there. Yet, in most cases, this indication is misleading because the visitor is on public tidelands or property where there is a public right to lateral access along the beach. These signs also clearly mislead the public by attempting to delineate the boundary between private and public property. Under well-settled State Law, all lands seaward of the MHTL are owned by the State of California and held in trust for the public. However, the location of the MHTL on the beach is a constantly moving boundary. A fixed location representing the MHTL cannot be determined on a beach in its natural state. Accordingly, the location identified on the signs at most could represent the location of the MHTL at one particular date and time – as hours and days go by, the location indicated on the sign will no longer be accurate.

¹⁸ This discussion of both the location and text on the sign is, by necessity, generalized since as noted above, the number and location of and text on the signs have changed greatly and frequently over time.

In addition, the state holds numerous easements for public access and recreation along Broad Beach. Commission staff has conducted several site visits and observed that the signs purport to identify private land but include land that appears to lie below the mean high tide line and, in many cases, also land over which there is a public right for lateral access along the beach at least 25 feet inland of the MHTL. The signs declare that the entire area landward of the signs and a certain distance seaward of the signs (in some cases 30 to 70 feet) is private.¹⁹ In some cases, the signs themselves may be on public tidelands. In fact, at some times, the signposts themselves have stood beneath several feet of ocean water. Therefore, many signs not only appear to be placed directly in state tidelands, but also purport to denote as private property the public tidelands a certain distance seaward of the private property sign, which of course would be even more clearly State tidelands.

TPOA has placed "Private Property/Do Not Trespass" signs on property where pursuant to the applicable CDP there is a public right to use the beach inland of the MHTL. At times, TPOA has placed as many as 30 to 40 private "Private Property/Do Not Trespass" signs distributed along approximately one mile of Broad Beach. This continuous row of signs -- even if none of them were to be located on parcels subject to a permit condition for lateral public access -- has and would convey the message that the entire length of Broad Beach is private and no public use of the beach is allowed (see Exhibit #10 for an example of this). The continuous row of signs conveys this message for all properties along Broad Beach, including the properties where there is a right to public lateral access inland of the MHTL. Accordingly, these signs interfere with and prevent public use of the areas adjacent to, and inland of, public tidelands that the CDPs require to be available for public use. Therefore, the signs are inconsistent with the policies of the Coastal Act that protect public access to the sea and opportunities for coastal recreation.

Many of the reports occurring between 2001 and 2003, have indicated that the private security patrol that drives ATVs on the beach has directed the public to leave the beach, claiming that the entire beach is private property. This action changes the intensity of use of the beach and ocean by affecting access to State waters and the public access easements and deed restricted areas. Moreover, the guards appear to instruct people to leave the beach without regard to whether they are on state tidelands, public access easements owned by the State, or land deed restricted for public access. This activity prevents the public from using areas of the beach where there is a right to public beach access provided by CDPs issued by the Commission and state law. This activity constitutes a change in the ability of the public to access public tidelands and to use Broad Beach for recreation. Moreover, the use of the security guards on ATVs adversely impacts the use of the beach by visitors who are on public tidelands or in

¹⁹ The unpermitted signs state (taken from a photograph taken by Commission staff on 9/10/03 of a sign in front of 30826 Broad Beach Road), PRIVATE PROPERTY – DO NOT TRESPASS – CALIF PENAL CODE SEC. 602(N) – PRIVATE PROPERTY BEGINS 50 FEET TOWARD THE OCEAN FROM THIS SIGN SURVEYED 9/03 (See Exhibit #3 for a close-up photograph of an unpermitted sign on Broad Beach).

areas where there is a right to use the beach inland of the MHTL, even if they are not told to relocate or leave. The use of the security guards on ATVs creates noise that reduces enjoyment of the beach by the public and causes a personal safety concern over being in the pathway of an oncoming ATV that may not be able to see a person lying on the sand. The use of the security guard patrols on ATVs creates an unwelcoming atmosphere for non-resident visitors that will reduce a visitor's enjoyment of the beach and may cause some visitors to decide not to visit Broad Beach in the future and is therefore inconsistent with the policies of the Coastal Act that protect public access to the beach and sea and opportunities for coastal recreation

In conclusion, the "Private Property/Do Not Trespass" signs clearly impede and discourage public access to a stretch of public coastline by giving the public the impression that the land is private property. In addition, the fencing on the sandy beach seaward of and/or adjacent to the two public vertical access ways that run perpendicular to the ocean creates a physical barrier to public access along the shoreline and along public access easements. Furthermore, the private security guard patrols have, through misleading and/or inaccurate statements and their physical appearance (as a private patrol), caused people to either relocate from a public area or leave the beach entirely. Therefore, it is clear that the unpermitted signs and fencing and the use of private security guards on ATVs are inconsistent with the Access and Recreation policies of the Coastal Act by discouraging, interfering, or preventing public access to public tidelands and public access and recreation easements and failing to protect water-oriented activities, inconsistent with Section 30210, 30211, 30220, and 30240 of the Coastal Act.

ii. Scenic and Visual Qualities

Section 30240: Environmentally sensitive habitat areas; adjacent developments

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.

Section 30251: Scenic and visual qualities

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly

scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting.

The Coastal Act and the Malibu LCP also protect the scenic qualities of coastal areas and require that development be sited and designed to protect surrounding coastal resources. In addition, the scenic and visual qualities of coastal areas must be protected as a resource of public importance²⁰. The scenic resources that must be protected in this area include the views to and along the beach and ocean and the scenic qualities associated with the natural beach environment. In this case, the unpermitted development, signs labeled “Private Property, Do Not Trespass”, fencing, and private security guard patrols riding across the beach on ATVs are all located directly on this heavily visited beach area. Such unpermitted development clearly diminishes the scenic resources of this coastal area. The public is confronted with a beach area that has had, at times up to 30 to 40 intimidating private property signs placed directly on it. During site observations, Commission staff found the signs located at the water line or even in the water, itself (giving the misleading appearance of a private beach area), which would impact the scenic qualities of the public beach area. Clearly, the beach experience one expects does not include seeing a line of “Private Property, Do Not Trespass” signs. In addition, private security guards on ATVs driving up and down the beach detract from the pristine and undisturbed qualities of the beach, and are clearly not consistent with the protection of the adjacent public recreational area (Zuma County Beach Park) and the protection of the coastal resources along Broad Beach, including the scenic and visual qualities of the coastline along Broad beach. This unpermitted development is therefore inconsistent with Sections 30240 and 30251 of the Coastal Act.

D. California Environmental Quality Act (CEQA)

The Commission finds that issuance of a cease and desist order to compel the removal of the unpermitted development from the subject properties is exempt from any applicable requirements of the California Environmental Quality Act (CEQA) of 1970 and will not have significant adverse effects on the environment, within the meaning of CEQA. The cease and desist order is exempt from the requirement for the preparation of an Environmental Impact Report, based on Sections 15060(c)(2) and (3), 15061(b)(2), 15307, 15308 and 15321 of CEQA Guidelines.

E. Summary of Facts

1. The Trancas Property Owners Association (TPOA) is a voluntary organization that is the homeowners association for the Broad Beach property owners located along Broad Beach, in the City of Malibu.

²⁰ §30240 and §30251 of the Coastal Act.

2. There are approximately 52 lateral public access areas (either through recorded easements, deed restrictions, or quit claim deeds) on properties at Broad Beach (identified in Exhibit #2 and #6). These public access areas are included in the conditions of CDPs that the Coastal Commission issued to the property owners to authorize private residential development. The conditions of approval of the CDPs, the easements, deed restrictions and/or quit claim deeds run with the land and bind the current owners of the property. The time period to challenge the Commission's decision has passed, and therefore, the CDPs and the terms and conditions of the CDPs are final.
3. The TPOA has undertaken development, as defined by Coastal Act Section 30106, at the Subject Properties, including the placement of "private property" and "no trespassing" signs, the construction of metal and wood fencing on the sandy beach seaward of and/or adjacent to two County owned, operated, and maintained vertical public access ways, and the use of private security guards on ATVs.
4. The subject unpermitted development is in violation of numerous Coastal Development Permits that included public lateral access easements or deed restrictions. The unpermitted development also violates approximately 15 CDPs that expressly state no "private property" signs are allowed on the beach, or that a CDP or CDP amendment is required for posting *any* signs on the property. The unpermitted development is also in violation of the Coastal Act.
5. The TPOA did not obtain CDPs for any of the unpermitted development it conducted. The TPOA did not obtain a CDP or amendment to any of the CDPs that were issued to individual property owners for the construction of homes on their property to undertake the above-described unpermitted development, which was inconsistent with these CDPs.
6. The TPOA employs a private security patrol that rides All Terrain Vehicles on the beach. This activity involves mechanized equipment on a sandy beach and affects the use of and access to water. The TPOA did not obtain a CDP for this unpermitted development nor did the TPOA obtain an amendment to the CDPs that required public access easements or deed restrictions on approximately 52 properties along Broad Beach.
7. The TPOA places, removes, relocates, and moves "private property" signs across and around Broad Beach, which purports to delineate the Mean high tide Line (MHTL). The signs purport to delineate as private lands a certain distance seaward of the "private property" sign. Only the State Lands Commission has the authority to delineate the MHTL. The TPOA did not receive approval from the State Lands Commission to delineate the MHTL nor has the State Lands Commission authorized the signs themselves. The information on the signs is inaccurate and misleading because (1) at most the signs can only identify the location of the MHTL at a particular date and time, and as hours and days go by, the locations indicated on the signs are no longer accurate (if they were ever accurate to begin with) and (2) the

signs purport to designate as “private property” areas that appear to be public tidelands and/or areas where there is an easement or deed restriction that grants the public the right to use the beach extending at least 25 feet inland of the MHTL or daily high water mark.

8. No permits were issued from the Coastal Commission, the State Lands Commission, the City of Malibu, or any other agency for the unpermitted development listed above.
9. No exemption from the permit requirements of the Coastal Act applies to the unpermitted development on the subject properties.
10. TPOA has submitted evidence which it claims shows a vested right to the signs and guard patrols which are the subject of this action. Based on the relevant facts and evidence, and applying the legal standard for a vested right to development under the Coastal Act, TPOA has failed to establish that they have a vested right to the unpermitted development described in Finding #3.
11. On June 23, 2004, Commission staff sent a letter to representatives of the TPOA notifying them that the signs, fencing, and guards are “development” as defined by the Coastal Act and that such development was placed or operated without a Coastal Development Permit and inconsistent with numerous CDPs, which required lateral public access easements and deed restrictions, and required conditions explicitly prohibiting signs on or seaward of 15 properties at Broad Beach. The letter also requested that the TPOA remove the signs and fencing and cease operation of the private security guards.
12. On August 18, 2004 Commission staff informed the TPOA via a *Notice of Intent to Commence Cease and Desist Order Proceedings* (“NOI”) that pursuant to Title 14, California Code of Regulations, Section 13191(a), the Commission intended to initiate cease and desist order proceedings against them, and outlined steps of the cease and desist process. This letter also explained that there is no vested right for any of the unpermitted development described in Finding #3.
13. On March 10, 2005, Commission staff re-sent the August 18, 2004 NOI in an excess of caution and to ensure formally that Commission staff properly notified the TPOA of the possibility of a Cease and Desist Order proceeding since Commission staff discovered that the “Domestic Return Receipt” from the August 18, NOI to the TPOA was not signed and returned to the Commission’s San Francisco office.
14. The unpermitted development described in Finding #3 is inconsistent with the policies set forth in Sections 30210, 30211, 30220, 30221, 30240, and 30251 of the Coastal Act.
15. Unless prohibited, the unpermitted development will cause continuing resource damages.

F. Violators' Defenses and Commission's Response

Kenneth A. Ehrlich, on behalf of the TPOA, submitted a Statement of Defense ("SOD"), which was received by the Commission staff on June 25, 2005, and is included as Exhibit #4 of this Staff Report. The following paragraphs describe the defenses contained in the SOD and set forth the Commission's response to each defense.

1. The Respondents' Defense:

On pages 3 through 6 of TPOA's SOD, TPOA alleges that the public access easements required by CDP conditions are "questionable" and were "held illegal in the U.S. Supreme Court's *Nollan* decision."

Commission's Response:

In its Statement of Defense, TPOA asserts that lateral access easements on Broad Beach are "questionable" and were "held illegal in the U.S. Supreme Court's *Nollan* decision." However, TPOA fails to disclose that, along with several individual property owners, it filed a lawsuit against the Commission challenging these easements on this very ground, and in fact, lost their challenge in the trial court. In July 2004, the Superior Court ruled that challenges to the lateral access easements on Broad Beach are barred by the statute of limitations because the property owners accepted the coastal permits and recorded the required offer to dedicate an easement, without filing a timely legal challenge to the easement requirement. (*Trancas Property Owners Assn. et al. v. State of California, et al.* (Los Angeles Superior Court, Case BC 309893). TPOA is appealing this decision. However, the California Court of Appeal has already ruled in the Commission's favor on the same issue in *Serra Canyon Company Ltd. v. California Coastal Commission* (2004) 120 Cal.App.4th 663, review denied, October 20, 2004, where the court found that a collateral attack on an offer to dedicate an easement required by a coastal permit condition was barred by the statute of limitations. The Court of Appeal indicated that "controlling authority" for its decision is the opinion in *Ojavan Investors, Inc. v. California Coastal Commission* (1994) 26 Cal.App.4th 516 and also relied on the federal court's decision in *Daniel v. County of Santa Barbara* (9th Cir. 2002) 288 F.3d 375. Therefore, there is clear authority that the legality of the lateral access easements on Broad Beach is not now subject to challenge. Moreover, TPOA neglects to mention the fact that for most of the parcels on Broad Beach where there is a public right to lateral access inland of the mean high tide line, the access resulted from either a deed restriction or lateral access easement required under a permit that was approved *before* the *Nollan* decision in 1987.

Property owners who received CDPs to construct single-family homes or remodel existing single-family homes along Broad Beach accepted both the benefits and the burdens of the CDPs. They were authorized and able to construct their homes adjacent to Broad Beach, a heavily used and popular public recreational area under the terms and conditions determined to be necessary to make the project approvable under the

Coastal Act, and now cannot obviate the burdens of those CDPs nor can TPOA take actions which are inconsistent with those CDPs.

It is clear that TPOA has installed “private property, no trespassing” signs along Broad Beach, constructed wood and metal fencing on the sandy beach seaward of and/or adjacent to two County-owned and operated vertical public access ways, and operate private security patrols on ATVs without a CDP and in direct conflict with previously issued CDPs. Thus, the requirements to issue a cease and desist order have been met.

2. The Respondents’ Defense:

On pages 8 through 10 of TPOA’s SOD, TPOA asserts that it has been the object of false information and exploitation by the Commission’s Executive Director, Coastal Access Manager and a member of the Commission.

Commission’s Response:

The issues that TPOA raises are not relevant to whether the evidence before the Commission shows a violation of the Coastal Act. The only relevant issue to this proceeding is whether there was either unpermitted development or violations of CDP requirements – that is, a violation of the Coastal Act establishing the grounds to issue an Order under Section 30810.

TPOA seems to imply that this administrative proceeding is not fair because of statements by these individuals. There is no evidence that the Executive Director has acted inappropriately by bringing this action against TPOA or seeking the relief that is requested. In fact, the Executive Director’s statements that TPOA complains about date from June 2005, more than a year after the Notice of Intent for this administrative enforcement action was sent to TPOA, and do not, in any way relate to the Coastal Act violations that are the subject of this enforcement action. The Executive Director’s request for an order in this action is based on facts indicating that placement of private property signs purporting to identify the location of the mean high tide line and patrolling of the beach with security guards on ATVs constitute development that is not authorized in a coastal permit, is inconsistent with previously issued CDPS, and that interferes with public rights to use tidelands, easements and areas deed restricted for public access on Broad Beach.

Furthermore, the Commission as a whole is the decision-maker in this action, not any of the individuals that TPOA complains about. There is no indication that the Commissioners will not provide TPOA a fair hearing and base their decision on the relevant law and the evidence presented.

TPOA also alleges that a Commissioner has a conflict of interest in this case because of personal experiences with issues related to Broad Beach and an organization run by the

Commissioner and spouse. This staff report will not address these issues, which will be addressed internally by legal staff and counsel. However, these assertions by the TPOA do not, in any way provide any evidence that the unpermitted “private property” signs, the unpermitted fencing, and the unpermitted private security patrol on ATVs were constructed or undertaken with the benefit of a CDP or otherwise indicate that there has not been a violation of the Coastal Act, or that Section 30810 does not apply here. In fact, as discussed above, the requirements to issue a cease and desist order have been met since the subject development was undertaken without benefit of a CDP and inconsistent with previously issued CDPs.

3. The Respondents’ Defense:

In TPOA’s SOD, TPOA raised several allegations that have no relevance to the issue of whether the subject activity was conducted without benefit of a CDP or inconsistent with a previously issued CDP.²¹ The TPOA raises the following issues in their SOD:

a) “There are no public facilities, no lifeguards, no restrooms, no changing areas, and no restaurants. Moreover, there is no reliable law enforcement.

Commission’s Response:

This argument is continually raised as a defense by property owners adjacent to public areas for unpermitted development adjacent to or on such public area. In fact, in California, most public beaches do not have such amenities as restaurants, lifeguards, and restrooms. The lack of these amenities does not, in any way, revert the land to private ownership or allow adjacent property owners to treat such public land as their own.

In addition, if a property owner on Broad Beach has a legitimate need for assistance from law enforcement, they have the ability to call and request this assistance as every other property owner has. Any shortage of law enforcement personnel does not give a homeowner the right to take the law into their own hands and conduct activities that are against the law, namely the placement of unpermitted “private property/no trespassing” signs, the construction of fencing on the sandy beach seaward of and/or adjacent to the two County-owned, operated, and maintained vertical public access ways, and the operation of private security guard patrols on ATVs, which are driven along the beach.

To issue a cease and desist order under Section 30810 of the Coastal Act, the Commission must find that development was undertaken without a CDP or inconsistent with previously issued CDPs. In this case, it is clear that the development undertaken by TPOA was, in fact conducted both without a CDP and inconsistent with previously issued CDPs.

²¹ Therefore, since this is the standard for a cease and desist order under Section 30810 of the Coastal Act, even if all these assertions were true, they would not provide a defense in a cease and desist order proceeding.

b) Dogs and Horses:

“The physical and health risks to beachgoers, private and public alike, from galloping horses, dog bites and horse and dog feces has reached an intolerable stage.”

Commission’s Response:

While there may be some members of the public who do not abide by local ordinances restricting certain animals on public areas, this is not a defense to the subject proceeding nor does it give the right to property owners adjacent to a public area to disregard the requirements of the Coastal Act. Since this is a local ordinance that restricts certain animals on this public area, such enforcement is handled at the local level. The fact remains that the unpermitted activity being addressed herein was conducted without benefit of a CDP and inconsistent with previously issued CDPs. In addition, while the Commission does not have to make a finding that the unpermitted development is inconsistent with the resource policies of the Coastal Act, the subject unpermitted development clearly impedes and/or prevents public access along both public areas below the MHTL and public areas included in public access easements and deed restriction. If it is the intent of the TPOA to enforce, on its own, local ordinances restricting certain animals on public areas, they are not only doing so in violation of the Coastal Act but also in a way that comes at the expense of a much larger population of beachgoers who are complying with animal restrictions.²²

c) Trespassers

“Trespassing on beachfront residential property is a recurrent problem.”

Commission’s Response:

As with any residential property adjacent to a public area, such as a sidewalks, streets, and parks, the public will be in close proximity to the private property. The avenue to address issues of trespassing, if there is a legitimate violation of law, is to contact the local law enforcement. As discussed in numerous correspondences between Commission staff and TPOA, there may be acceptable signs that could be authorized in a CDP, which would be placed on private property, away from the sandy beach area, requesting that the public respect the private property, which could help ameliorate the problem. In addition, if property owners feel the need to protect their homes from trespassers, they have the ability to hire their own security that would not affect public access along Broad Beach or give the appearance that public areas of the beach are private.

²² Commission staff notes that on several occasions staff has observed property owners at Broad Beach walking their own dogs across public portions of the beach.

The subject unpermitted development clearly gives the false impression that Broad Beach is entirely private and interferes with the public's ability to access the public portions of the beach.

d) "Storm Damage to Beach and Dunes"

"There are numerous large drain pipes along the entirety of Broad Beach.... During periods of heavy storms, the discharge from these drains is devastating. It blows out the dunes and causes erosion throughout the dune area.... There is little or no regard by government agencies for the consequences of this poor planning and its impacts on the volume of water results.... All repair and restoration is undertaken at the homeowner expense, including that done this year."

Commission's Response:

This assertion does not respond in any way to the substance of this proceeding. The "private property" signs, fencing, and private security guard patrols were placed or undertaken without benefit of a CDP and inconsistent with numerous CDPs along Broad Beach properties and such unpermitted development is not related in any way to any alleged drain pipe issues, and certainly do not provide a defense to this proceeding. Commission staff notes that there are several storm drainpipes that exit onto Broad Beach. A majority of these are, in fact, small pipes that Broad Beach property owners have installed (with or without CDPs) to direct water runoff from their homes and landscaped yards to the beach. While there may be a large volume of water that drains from Pacific Coast Highway (above Broad Beach) or from the above hillsides and developments, staff notes that the photographs cited in TPOA's defense and included as Tab 4, 5, and 6 in their SOD appears to show heavy beach erosion from storm waves and tides and not necessarily from storm drain runoff. The beach is eroded in a lateral line well inland of the storm drain outlet typical of high wave run-up and beach scour from winter tides and storm waves. Staff also notes that, while not a part of this proceeding, any "repair" or "restoration" of the dunes or beach is development under the Coastal Act and does require a coastal development permit. The activity that TPOA refers to that was "done this year" is the subject of an ongoing enforcement matter as such development was undertaken without benefit of a CDP.

e) "Ocean Safety"

"In addition to saving lives... lifeguards on publicly maintained beaches protect beach goers and remind them of their responsibilities. Because there are no public facilities or lifeguards on Broad Beach, the presence of our service patrol... provides some measure of protection."

Commission's Response:

Again, this assertion does not respond in any way to the substance of this proceeding. The "private property" signs, fencing, and private security guard patrols were placed or undertaken without benefit of a CDP and inconsistent with numerous CDPs along Broad Beach properties. In addition, the private security guard patrols have discouraged and/or prevented public access along Broad Beach. To alleviate the concerns the TPOA raises in this assertion, there are clearly other means to try and address this issue without violating the Coastal Act. For example, Commission staff has been working with TPOA to try and arrange for TPOA to employ or contract with State, County, or City lifeguards.

4. The Respondents' Defense:

"Public Access Through Prescriptive Use"

"Lateral access is sometimes obtained by the public over private property... by what is referred to as 'adverse' or 'prescriptive use'.... In Gion, the California Supreme Court held that the public had gained prescriptive use over private property because the public had used the land for more than five years with full knowledge of the owner, without asking or receiving permission to do so and without objection being made. In order to register objections, the Supreme Court noted the appropriateness of 'No Trespassing' signs but cautioned that something more is required 'to halt a continuous influx of beach users to an attractive seashore property'.... In order to ensure that lateral access over their home sites is not inadvertently lost through prescriptive use, Broad Beach residents have taken rational protective steps in accordance with the Supreme Court decision of Gion and subsequently enacted legislation by the California State Legislature, Civil Code § 1008."

"There are obviously means by which property owners may make clear their intent to not permit loss of their property through adverse or prescriptive use. The most obvious, and certainly unacceptable means is to station someone at the property and simply prohibit people from crossing over the land. Other less obtrusive and civil means are preferable. Appropriate signage, such as 'No Trespassing' or other language, is commonly employed, and lawful. See Gion and California Civil Code § 1008. Our Association has provided two services which serve this purpose, among others. They are signage and the service patrol. Each has been in existence since prior to the adoption of the Coastal Act."

Commission's Response:

During Commission staff's first meeting with TPOA on August 24, 2004 and in a follow-up letter of September 1, 2004, by Commission staff counsel, Sandra Goldberg, we addressed TPOA's claims that Gion justifies the placement of "Private Property/No Trespassing" signs on Broad Beach (see Exhibit #14 for a copy of the September 1

letter). We note that even if true, Gion in no way provides an exemption from complying with the Coastal Act or any other applicable laws. Moreover, far from being the only way to prevent prescriptive rights, Commission staff noted that the Civil Code specifically provides other options to address the concerns about implied dedication that have been raised by the TPOA. On July 11, 2005, in response to TPOA raising the same issues in their SOD, Commission staff sent a second letter responding to TPOA's defenses. This letter was sent to further clarify some of the legal issues apparently giving rise to concerns the TPOA had expressed regarding the need for private property signs to protect against a finding of implied dedication.

Of course, TPOA's concerns about adverse or prescriptive rights are not valid with respect to public tidelands or areas along the beach where there is an easement or deed granting a public right to access. TPOA has no right or legitimate need to place signs designating these areas as private property.

It should be noted the California Legislature responded to the holding of Gion v. City of Santa Cruz (2 Cal. 3d 29, 1970) by enacting California Civil Code section 1009 in 1971. Specifically, in reaction to Gion, Civil Code section 1009 identified three means by which a private landowner may prevent implied dedication of coastal property: posting signs, recording notice, or entering a written government agreement. In fact, California Civil Code Section 813, enacted in 1965, was amended in 1971 specifically in reaction to Gion, and was designed to provide a means of recording notice to prevent implied dedication of coastal property. Particularly, language was changed in the statute's second paragraph to establish that "recorded notice is conclusive evidence" that any use is permissive, subject to revocation, and dispositive in any judicial proceeding on implied dedication or prescriptive right issues. The provisions in Section 1009(f)(2) for the recording of such notices, and the fact that this section was passed as a specific reaction to Gion is further discussed in the more recent California Court of Appeals case of Burch v. Gombos, where the court indicated: "The previously mentioned enactment of Civil Code section 1009 and amendments to Civil Code section 813 were a Legislative reaction to Gion and largely abrogated its holding." (2000) 82 Cal. App. 4th 352, 361 fn.12.

Therefore, under section 1009(f), a private landowner may prevent implied dedication of coastal property through recording a notice as provided under California Civil Code section 813. Given the option of recording notice, placing private property signs on Broad Beach is not legally necessary to prevent implied dedication. Commission staff notes that Section 1009 also provides the option of entering a written agreement with a government agency providing for public use as a means to avoid public prescriptive rights.

Moreover, as was pointed out to TPOA in several correspondences and throughout this Staff Report, the posting of signs is development under the Coastal Act, and posting of signs within the coastal zone requires a Coastal Development Permit (CDP) to be legal

coastal development under Chapter 3 of the Coastal Act (1972) and Gion in no way provides some exception to this.

In fact, placement of any such signs, including those contemplated by the Civil Code, is not exempt from the permit requirements of the Coastal Act. The Civil Code provides no such exemption. Therefore, compliance with both state laws is required and the Association may only place such signs if they have been authorized pursuant to a coastal development permit, which in this case has not occurred. Although the signs are not the only means legally sufficient for a property owner to protect them from implied dedication, as noted above, the TPOA does have the right to apply for approval for signs that do not discourage or prevent public access along the public areas of Broad Beach.

As was previously pointed out to TPOA in our numerous conversations and in our letters of June 23, 2004, March 10, 2005, and July 11, 2005, the text on the signs placed by the TPOA is, at least in many cases, misleading and inaccurate. Clearly, the Civil Code sections do not authorize signs that inaccurately identify private property. The signs purport to delineate a point a fixed number of feet seaward of the sign as the beginning of the mean high tide line. The evidence indicates that the purported border identified on the signs placed by the Association is inaccurate (at many times, the signs have been documented to actually be under water). The location of the MHTL on the beach is a constantly moving boundary. A fixed location representing the MHTL cannot be determined on a beach in its natural state. Accordingly, the location identified on the signs at most could represent the location of the MHTL at one particular date and time – as hours and days go by, the location indicated on the sign will no longer be accurate.

In addition, approximately 15 properties have, via their CDP requirements, conditions that explicitly prohibit the placement of “private property” signs on the beach, or require a CDP or CDP amendment for posting of any signs on the property. The signs that were placed on parcels with such a condition is clearly inconsistent with and in violation of those CDPs.

5. The Respondents’ Defense:

Signs and Security Guards

“The Association has placed signage on the beach since prior to the enactment of the Coastal Act. The signage has been maintained throughout all of these years without interruption, except for periods of heavy storms when the signs were removed only to be replaced. They have remained off the sandy beach since early this year at Commission staff request in order to facilitate settlement discussions.”

“As true with the signs, there has been a service patrol in place continuously since prior to the enactment of the Coastal Act. It was originally on foot and in later years on both foot and all terrain vehicles (‘ATVs’). “

The TPOA alleges that a letter from Commission staff in 1995 recognized that “existing signs which have not been replaced or modified in their language, and whose existence either predates the Coastal Act or received a coastal development permit are permitted to remain.”

Commission’s Response:

The assertion raised above relate to the finding of a “vested right” for certain development. As thoroughly discussed in *Section C - Vested Rights Analysis* on pages 15 through 21 of this staff report, incorporated by reference here, it is clear that TPOA does not have vested rights for “private property” signs, fencing seaward of the two County-owned and operated vertical public access ways, and private security guards on ATVs. The unpermitted development did not have all government approvals prior to the enactment of the Coastal Act, TPOA did not incur substantial liabilities prior to the enactment of the Coastal Act, and even if the original unpermitted development had been vested, there was a substantial change in the development (the “private property” signs are removed, replaced, and moved around and across the beach and the language of the signs purporting to denote land as private changes constantly; and the security guard patrols that were allegedly patrolling the beach prior to the Coastal Act were, as stated by TPOA, on foot and sometime after the enactment of the Coastal Act began the security patrols on ATVs or other mechanized equipment).

The TPOA allege that in a letter from Commission staff to TPOA, staff, in some way, recognized the existence of signs prior to the Coastal Act. However, the TPOA fails to cite the conclusion of the letter, which states, “However, we also are aware that many of these signs are removed or destroyed in the winter time and replaced in the spring and summer. Further, the statement on the sign itself has changed, which alters the point of public access to the water. As such, the placement of any sign must receive a coastal development permit.” The letter continues by noting the fact that, at the time of the letter, there were no security guard patrols or signs on the beach. The letter concluded by stating, “to place any signs on the beach at any time in the future will require a coastal development permit” and that any signs placed as of receipt of the letter would be a violation of the Coastal Act.

In addition, the TPOA allege that staff, through this letter, informed TPOA that they have the right to patrol private property. The letter does state that they have the right to employ patrols that do not discourage or prevent public access to public areas on Broad Beach. Commission staff’s letter does not state that TPOA has a right to use ATVs or other mechanized equipment to conduct the patrols. As addressed above and incorporated here, the private security guard patrols discourage and/or prevent public access across Broad Beach.

6. The Respondents’ Defense:

TPOA “Initiated Settlement/Compromise Efforts”

On pages 10 and 11 of TPOA's defense, TPOA refers to settlement discussions during 2004 and 2005, alleges that the Commission delayed in meeting with TPOA, and claims that there is no need for the Commission to proceed with this action.

Commission's Response:

The above assertion does not provide any evidence to support a claim that the findings for a cease and desist order have not been met. The defense alleges that there was a delay in meeting with TPOA to discuss the violations. Commission staff notes that our first violation letter initiating the current Commission effort to resolve the violations was sent to TPOA on June 23, 2004. This letter explained that the placement of signs and operation of the private security guard patrols are development that require a CDP and requested the TPOA remove the signs and cease operation of the security guards. The unpermitted development remained on the beach; and therefore, on August 18, 2004, Commission staff sent a Notice of Intent to Commence Cease and Desist Order Proceedings. After several pieces of correspondence were sent to ascertain the identity of the legal representative for TPOA, Commission staff met with members of TPOA on August 23, 2004. Therefore, there was a relatively short period of time between the initial violation letter and Commission staff's meeting with TPOA.

The remainder of this defense is a generalized history of attempts to resolve the violations without initiating these proceedings. Commission staff had hoped to resolve these issues through a consent cease and desist order. TPOA appears to allege that "positive discussions came to a halt" after Commission staff attempted to resolve a separate violation case involving TPOA's grading of Broad Beach for the creation of a large, linear berm on the upper beach area. TPOA also refers to a Commission offer to settle monetary penalties for the violation involving the berm. The violation case involving the unpermitted construction of a sand berm across the length of Broad Beach is completely separate and distinct from the subject violation case and Commission staff was willing to continue these settlement discussions related to the unpermitted signs, fences, and patrols.

Finally, TPOA states, "there is no need for any Commission action at this time." The SOD alleges that there are, at this time, no signs on Broad Beach that were placed by the TPOA and that the service patrol is currently not using ATVs and the guards have been provided coastal access guides and "have been instructed to do nothing that interferes with the public's right of lateral access below the mean high tide line and above the mean high tide line where such rights have been granted". While this is a very positive step to prevent the continuing impacts to public access along Broad Beach, due to the episodic nature of the violations at Broad Beach and the desire to resolve these with certainty and avoid future complications given our inability to reach a settlement of this matter over the last year, it appears that a Commission cease and desist order to address the subject unpermitted development is necessary and would provide certainty and avoid future problems and violations.

The cease and desist order would require the TPOA to cease and desist from performing or maintaining unpermitted development including placement of "private property" signs along Broad Beach and fencing on the sandy beach located seaward of and/or adjacent to the two County owned and operated vertical public access ways; to cease and desist from operating private security guards on ATVs; and to cease and desist from conducting further unpermitted development along Broad Beach. Commission staff notes that these requirements are apparently consistent with TPOA's current actions as represented in their July 13, 2005 letter and in their SOD, and therefore the issuance of this Order should not be objectionable, and would prevent any future violations and would further strengthen the commitment to desist from placing any unpermitted signs, remove the fencing, and discontinue the use of the private security patrols on ATVs.

G. Actions in Accordance with Authority Granted to Commission and Staff

The statutory authority for issuance of this Cease and Desist Order is provided in Section 30810 of the Coastal, which states, in relevant part:

- (a) If the Commission, after public hearing, determines that any person...has undertaken, or is threatening to undertake, any activity that 1) requires a permit from the commission without first securing the permit or 2) is inconsistent with any permit previously issued by the Commission, the Commission may issue an order directing that person...to cease and desist.*
- (b) The cease and desist order may be subject to such terms and conditions as the Commission may determine are necessary to ensure compliance with this division, including immediate removal of any development or material...*

The procedures for the issuance of a Cease and Desist Order are described in the Commission's Regulations in Sections 13180 through 13188. Section 13196(e) of the Commission's regulations states the following:

Any term or condition that the commission may impose which requires removal of any development or material shall be for the purpose of restoring the property affected by the violation to the condition it was in before the violation occurred.

Accordingly, the purpose of this Cease and Desist Order is to order removal of unpermitted development from the subject properties and to cease and desist operation of private security guards on ATVs and placement of unpermitted signs and fencing, and from undertaking any other development activities without a CDP, including activities which discourage or prevent public access across Broad Beach.

Staff recommends that the Commission issue the following Cease and Desist Order to Trancas Property Owners Association:

CEASE AND DESIST ORDER NO. CCC-05-CD-00

- 1.0 Pursuant to its authority under Public Resources Code Sections 30810, the California Coastal Commission (hereinafter "Commission") hereby orders and authorizes the Trancas Property Owners Association, all its employees, agents, contractors, and any persons acting in concert with any of the foregoing (hereinafter, "TPOA"), to take all actions required by this Order, including:
- A) Cease and desist from placing, maintaining or conducting any unpermitted development on Broad Beach on either private and/or public property (hereinafter "Subject Properties"), including but not necessarily limited to: "private property" and/or "no trespassing" signs, wood and metal fencing on the sandy beach seaward of and/or adjacent to the two County maintained and operated public vertical access ways at 31344 and 31200 Broad Beach Road, and private security guard patrols on All Terrain Vehicles (hereinafter "ATVs") or other motorized vehicles,
 - B) Refrain from conducting any future development on the Subject Properties not authorized by a CDP or this Cease and Desist Order (hereinafter "Order"),
 - C) Refrain from undertaking any activity that violates the terms or conditions of any Coastal Development Permit issued for development along Broad Beach, including but not limited to any condition that included a public access easement, deed restriction, or Quit Claim deed or that prohibited the placement of "private property" signs on the beach, and
 - D) Refrain from undertaking any activity that discourages or prevents use of public tidelands, public lateral access easements, or areas deed restricted for public access on Broad Beach, including use of private security guards to: 1) question any person who is present on such areas and not violating any applicable state or local law or regulation, or 2) to attempt to cause any person who is present on such areas and not violating any applicable state or local law or regulation to leave or to move.
- 1.1 Accordingly, the TPOA shall, upon issuance of this Order, immediately cease and desist operation of the private security guard patrols on motorized vehicles or which affect public access to public area, and within 7 days of issuance of the Order, commence removal of any and all unpermitted development on the Subject Properties including, but not necessarily limited to, "private property" and/or "no trespassing" signs on the beach and fencing on the sandy beach seaward of and/or adjacent to the two County-owned, operated and maintained public vertical access ways at 31344 and 31200 Broad Beach Road.

- 1.2 Removal of the unpermitted development shall be completed within 10 days of issuance of this Order.
- 1.3 Within 15 days of completion of the removal, TPOA shall submit, for the review and approval of the Executive Director, a report documenting the complete removal of the unpermitted development specified above. The report shall include photographs that clearly show all portions of the Subject Properties to ensure that the removal has occurred.
- 1.4 All plans, reports, photographs and any other materials required by this Order shall be sent to:

California Coastal Commission
Headquarters Enforcement Program
Attn: Aaron McLendon
45 Fremont Street, Suits 2000
San Francisco, California 94105
Facsimile (415) 904-5235

With a copy sent to:
California Coastal Commission
South Central Coast District Office
Attn: Pat Veasart
89 S. California Street, Suite 200
Ventura, CA 93001
Facsimile (805) 641-1732

2.0 PERSONS SUBJECT TO THESE ORDERS

- 2.1 The persons subject to this Cease and Desist Order are the Trancas Property Owners Association, its officers, directors, members, employees, agents, contractors, and anyone acting in concert with the foregoing.

3.0 IDENTIFICATION OF SUBJECT PROPERTIES

- 3.1 The properties that are the subject of these Orders are located on an approximately 1.1 mile of beach known as Broad Beach in the City of Malibu on both public and private property, Los Angeles County.

4.0 DESCRIPTION OF COASTAL ACT VIOLATION

- 4.1 Respondent's Coastal Act violations consist of performing and maintaining development that is not authorized in a coastal development permit, and therefore are violations of the Coastal Act, and performing and maintaining development that also violates the terms and conditions of Coastal Development Permits, and public lateral access easements and deed restrictions recorded on the Subject Properties. The unpermitted development includes: 1) placement of "private property" signs, 2) construction of wood and metal fencing on the sandy beach seaward of and/or adjacent to the two County-owned, operated, and maintained public vertical access ways, and 3) use of private security guards on All-Terrain Vehicles or other mechanized equipment on the beach, all of which discourage or prohibit public access along the beach.

5.0 COMMISSION AUTHORITY TO ACT

- 5.1 The Commission is issuing this Order pursuant its authority under Section 30810 of the Public Resources Code.

6.0 FINDINGS

- 6.1 This Order is being issued on the basis of the findings adopted by the Commission on August 12, 2005, as set forth in the foregoing document entitled: STAFF RECOMMENDATIONS AND FINDINGS FOR CEASE AND DESIST ORDER.

7.0 EFFECTIVE DATE

- 7.1 This Order shall become effective as of the date of issuance by the Commission and shall remain in effect permanently unless and until rescinded by the Commission.

8.0 COMPLIANCE OBLIGATION

- 8.1 Strict compliance with the terms and conditions of this Order is required. If TPOA fails to comply with the requirements of this Order, including any deadline contained herein, it will constitute a violation of this Order and may result in the imposition of civil penalties of up to six thousand dollars (\$6,000) per day for each day in which compliance failure persists and additional penalties authorized in Chapter 9 of the Coastal Act, including exemplary damages.

9.0 EXTENSIONS OF DEADLINES

- 9.1 Any extension requests must be made in writing to the Executive Director and received by the Commission staff at least 10 days prior to the expiration of the subject deadline. If the Executive Director determines that TPOA has made a showing of good cause, he/she may at his/her discretion grant extensions of the deadlines contained herein.

10.0 APPEALS AND STAY RESOLUTION

- 10.1 Pursuant to Public Resources Code Section 30803(b), TPOA, against whom this Order is issued, may file a petition with the Superior Court for a stay of these Orders.

11.0 GOVERNMENT LIABILITY

- 11.1 The State of California shall not be liable for injuries or damages to persons or property resulting from acts or omissions by TPOA in carrying out activities

authorized under this Order, nor shall the State of California be held as a party to any contract entered into by TPOA or their agents in carrying out activities pursuant to this Order.

12.0 GOVERNING LAW

12.1 This Order shall be interpreted, construed, governed and enforced under and pursuant to the laws of the State of California, which apply in all respects.

13.0 NO LIMITATION OF AUTHORITY

13.1 Except as expressly provided herein, nothing herein shall limit or restrict the exercise of the Commission's enforcement authority pursuant to Chapter 9 of the Coastal Act, including the authority to require and enforce compliance with this Order.

Issued this 12th day of August, 2005 in Costa Mesa, California

Peter M. Douglas, Executive Director
California Coastal Commission

Date

CCC-05-CD-09
Exhibit List

Exhibit Number	Description
1.	Site Map and Location
2.	Coastal Access Guide for Broad Beach prepared by the Commission's Public Access Program, depicting public access easements and deed restrictions.
3.	August 1, 2003 photograph of unpermitted "Private Property" sign on Broad Beach.
4.	Statement of Defense, received on June 25, 2005, by Ken Ehrlich of Jeffer Mangels Butler & Marmaro LLP.
5.	List of Assessor Parcel Numbers and addresses for properties located along Broad Beach.
6.	List of properties and coastal development permits, which included lateral public access via access easements, deed restrictions, or other form of recorded legal document.
7.	June 26, 2003 and July 20, 2004 photographs of unpermitted private security guard patrol.
8.	August 1, 2003, July 20, 2004, and May 14, 2005 photographs of unpermitted fencing on the sandy beach seaward of and/or adjacent to the County-owned and operated vertical public access way.
9.	August 1, 2003 and July 20, 2004 photographs of unpermitted "Private Property" signs on Broad Beach.
10.	Undated photograph showing a line of unpermitted "Private Property" signs along Broad Beach.
11.	Notice of Violation letter, June 23, 2004.
12.	Notice of Intent to Commence Cease and Desist Order Proceedings, August 18, 2004 (as re-sent on March 10, 2004).
13.	Letter of June 28, 2004 from Marshall Grossman to Commissioner Steve Kram.
14.	Letter of September 1, 2004 from Sandra Goldberg, Commission staff counsel to Marshall Grossman regarding prescriptive rights.
15.	Letter of March 25, 2005 from Aaron McLendon, Commission Statewide Enforcement Analyst to Marshall Grossman regarding "No Sign" conditions included in 15 coastal development permits for properties at Broad Beach.
16.	Letter of July 11, 2005 from Sandra Goldberg to Marshall Grossman and Kenneth Ehrlich addressing TPOA's reliance on the <u>Gion</u> case.
17.	Letter of July 1, 2004 from Marshall Grossman to Peter Douglas.
18.	Letter of July 26, 2005 from Aaron McLendon to Marshall Grossman and Kenneth Ehrlich regarding scheduling of cease and desist order proceedings at the Commission's August 2005 hearing.